Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS INTERNATIONAL LIMITED,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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February 21, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

REVISED LIST OF AFFILIATED COMPANIES

Thomas Built Buses L.P., a Delaware limited partnership, sole shareholder of Thomas International Limited.

Thomas Built Buses, Inc., a North Carolina corporation, General Partner of Thomas Built Buses L.P. (and formerly the sole shareholder of Thomas International Limited).

Thomas Built Buses International, a Virgin Islands corporation controlled by Thomas Built Buses L.P.

Carrocerias Ecuatorianas Thomas, S.A., an Ecuadorian corporation controlled by Thomas Built Buses L.P.

Ricaseneth, an Ecuadorian corporation controlled by Thomas Built Buses L.P.

Thomas-Built Buses of Canada Limited, a Canadian corporation controlled by Thomas Built Buses L.P.

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Respondent's Memorandum in Opposition emphasizes that the questions presented have little prospective importance because of the repeal of the Domestic International Sales Corporation ("DISC") provisions of Internal Revenue Code ("Code") Sections 991 through 997 with respect to tax years after 1984. The repeal of the DISC provisions did not, however, vitiate the significance of the narrow question of the validity of Treas. Reg. § 1.993-2 (d) (2) (the "993 Regulation") to the many taxpayers who have brought (and are bringing) actions with respect to tax years that remain open and in which the issue has arisen. *E.g., CWT Farms, Inc. v. Commissioner*, 754 F.2d 790 (11th Cir. 1985), *petition for cert. pending*, No. 84-1966; *Gehl Co. v. Commissioner*, 49 T.C.M. (CCH) 372 (1984), *appeal docketed*, No. 85-1326 (7th Cir. Feb. 25, 1985). Because the rules that govern the phasing out of the DISC provisions provide for the dis-

tribution of all accumulated DISC income through December 31, 1984 to a DISC's shareholders free of tax, the issue of DISC qualification remains critical to many taxpayers. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 801, 98 Stat. 985 (enacting Code Sections 921 through 927, which replace the DISC system with the system of foreign sales corporations). In addition, the broader question whether the analysis of the Circuit Courts of Appeal on the issue conflicts with decisions of this Court concerning the scope of the Treasury's authority in promulgating regulations under Code Section 7805(a) is appropriate for the reasons Petitioner has set forth in its Petition. Pet. 6-9.

Petitioner would also call the Court's attention to the severe consequences of termination of DISC qualification because of a failure to comply with the 60-day payment rule of the 993 Regulation. Termination of DISC qualification means that the DISC's entire accumulated income (and not simply the income for the years of disqualification) is taxed to its shareholder. As noted by the Claims Court, a violation of the 60-day payment rule in the context of Treas. Regs. § 1.994-1(e)(3)(i) results only in reallocation of the income between the DISC and its related supplier. Pet. App. SA14. It is anomalous that the consequence of violation of a legislative regulation should be less severe than the consequences for violation of an interpretive regulation.

In addition, Petitioner once again notes that the government's justification for the 993 Regulation—to prevent circumvention of the producer's loan requirements of Code Section 993(d)—has no vitality in the face of facts such as those of this case, in which the producer's loan requirements have not been violated. Pet. 12. Nor is the justification sustainable as an interpretation of any statutory language. Rather, "[i]t is an effort to close a loophole by adding a requirement to the statute which Congress failed to adopt." Pet. App. SA11.

For the reasons set forth above and the reasons set forth in Petitioner's Petition, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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